Neutral Citation Number: [2022] EWHC 2207(QB)

Case No: QB-2020-002489

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 August 2022

Before:

HER HONOUR JUDGE CARMEL WALL
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

MXX	**Claimant**
- and -	
A SECONDARY SCHOOL	**Defendant**

- -
- -

Mr J. Levinson (instructed by Bolt Burdon Kemp LLP) for the Claimant
Mr J. Owen (instructed by DWF Law LLP) for the Defendant

Hearing dates: 6 and 7 July 2022

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APPROVED JUDGMENT

This judgment was handed down by the Judge remotely on 19 August 2022.

HHJ Carmel Wall:

Introduction

1. The Defendant is a co-educational secondary school. It provides education for children of senior school age from 11 to 16, in Years 7 to 11, up to and including taking their GCSEs.

2. On 5 December 2013, when aged 13, the Claimant joined the school as a Year 8 pupil.

3. Between 24 and 28 February 2014, one of the Defendant's former pupils ("PXM") undertook a Work Experience Placement ("WEP") at the Defendant's school. He was then 18 years old and attending college hoping to qualify as a Physical Education ("PE") teacher. Attending a WEP was a compulsory part of his course.

4. Both parties agree that the WEP took place for one week only during the February dates indicated above. That is different from the parties' respective pleaded cases. The correct dates of the WEP were not identified until receipt of disclosure from the police. Both parties have agreed to proceed on the basis of the correct dates without requiring the statements of case to be amended. I have addressed the evidence on this basis.

5. It is the Claimant's case that the Defendant is vicariously liable for torts committed against her by PXM. The torts relied on are those of assault and battery and intentional infliction of injury. The Claimant relies on the convictions of PXM at Portsmouth Crown Court on 2 November 2015 to prove that serious sexual offences were perpetrated against her.

6. The Defendant admits that torts of assault and battery were committed by PXM against the Claimant, no earlier than 2 August 2014. The Defendant does not admit that the elements required to be proved for the tort of intentional infliction of injury are present, but if proved, the Defendant argues they too post-dated the WEP by some time.

7. The Defendant's main contention is that it is not vicariously liable for any of the torts that may be proved to be committed by PXM. The issue of vicarious liability has been the main area of contention in this trial.

8. Quantum has been agreed subject to liability in the sum of £27,500.

9. Two further matters are worthy of note by way of introduction.

10. The first concerns the Claimant. There is absolutely no doubt that she has been the victim of serious sexual abuse when a 13 year old girl. Whether or not, as a matter of law, the Defendant is vicariously liable for that abuse, it does not diminish the abhorrent nature of the crimes committed against her nor their impact.

11. The second concerns the Defendant. This claim is brought solely on the basis of vicarious liability. That is a test of strict liability. A Defendant may be vicariously liable for the acts of another without fault. There is no allegation of fault made or pursued against the Defendant.

Anonymity Order

12. I made an Order granting anonymity to the Claimant at the commencement of the trial.

13. She seeks damages for personal injuries consequent on proven sexual assaults. She has a statutory entitlement to anonymity pursuant to s1(1) of the Sexual Offences (Amendment) Act 1992.

14. I was persuaded by Mr Levinson that in order to protect the identity of the Claimant in the particular circumstances of this case, it was necessary also to anonymise the names of the Defendant and the tortfeasor. The Defendant potentially falls within the scope of s1(3A) of the Act which provides a list of matters relating to a person that may lead to the identification of that person and so may be prohibited from publication. I was persuaded by the submission that identifying the tortfeasor was likely to have the result that the Claimant would be identified as the person against whom the sexual crimes were committed, because of the peculiar context of this claim.

15. I was also satisfied that the Article 10 right to freedom of expression was outweighed by the Claimant's Article 8 right to privacy. The facts could be sufficiently reported without the need to identify the Claimant.

16. The application for anonymity in the broad terms suggested by Mr Levinson was not opposed. No members of the press were in court when the order was made, but I have provided within the Order for any interested person to apply on notice to vary the Anonymity Order.

17. The Claimant is not to be referred to by name but rather as "MXX". The Defendant is to be referred to as "A Secondary School" and the tortfeasor as "PXM".

The Key Issues to Decide

18. The key issues are these:

    a. What was the nature of the interaction between the Claimant and PXM; when did it take place; and in what circumstances?
    b. What are the torts proved to have been committed by PXM against the Claimant?
    c. Is the Defendant vicariously liable for any/all of those proven torts?

Assessment of Evidence

19. The Claimant gave evidence from the witness box. She is now a mature woman with family responsibilities and professional aspirations. She was a composed, dignified and articulate witness. When the events with which this trial has been concerned occurred, she was a troubled adolescent.

20. The evidence she gives relates to events that occurred eight years ago. That is a long time for anyone to remember back with accuracy. But the effect of that passage of time is exacerbated by the fact that in 2014 she saw things as a child whereas now she looks back on them as an adult.

21. It is only to be expected, because of the passage of time, that there will be some vagueness in her recollection. Details are likely to become elusive.

22. Memories not only fade as time passes but can also become unreliable. There is a risk that a witness can become sure of something that is not in fact true or accurate.

23. A good example of this is the Claimant's adamant evidence that no one from the Defendant's staff spoke to her about social media contact with PXM in March 2014. Her evidence is that she is "100% sure" of that. But she must be wrong. A contemporaneous child protection record made on 5 March 2014 and timed at 13.42 records:

    "AB and JK interviewed MXX at 13.35. MXX said that she was talking with friends about PXM who is an ex student at the school and whom (sic) was doing work experience in the PE department over the last few weeks.

    MXX said that she has not got the phone number of PXM; however she is friends with him on Facebook."

24. In a witness statement made to the police on 11 September 2019, AB, the then Assistant Head Teacher, referred to an interview he had with MXX in March 2014 and said, "she admitted being a 'friend' with PXM on Facebook".

25. It has not been suggested that the contents of the child protection record have been fabricated and there is absolutely no evidential basis for such a suggestion. It is inherently implausible that the record was made for any reason other than to record what had actually happened. Mr Levinson did not challenge AB about it. Indeed it is part of the Claimant's case that this is a reliable record that shows that the Claimant and PXM were in Facebook contact from at least the date of the interview.

26. It is a common experience that an adult will analyse events from childhood through the lens of hindsight. There is a risk that when doing so, events will be given a significance that they did not in fact have at the time they occurred. That is a risk to which I have paid particular attention in this case, because of the reliance placed by the Claimant on limited interactions with PXM during the WEP in February 2014.

27. The starting point for finding the facts therefore must be the contemporaneous documentary evidence created long before this litigation was contemplated. That includes what was said to the police during their criminal investigation and what was exchanged by way of Facebook Messenger messages between the Claimant and PXM.

28. I bear in mind that the Facebook messages that have been recovered begin in July 2014 although this was plainly not the beginning of the messaging. I accept the Claimant's evidence that before July 2014 she deleted messages at the instigation of PXM. That was because he wanted to ensure that their relationship remained a secret. That is consistent with PXM manipulating her.

29. There is, though, in consequence, no objective reliable evidence of the contents of those earlier messages, nor their frequency.

30. The fact that the earlier messages are not in evidence simply means there is an explained absence of evidence. I draw no inference for or against the Claimant. I have looked to other evidence to assist me to make findings on the balance of probabilities, about how the messaging developed. By way of example, it is the Claimant's unchallenged evidence that the first time PXM sent her any indecent images of himself was on 4 July.

31. There are differences between the Claimant's evidence and the contemporaneous records. Apart from the reasons I have already addressed, there are other possible explanations for those inconsistencies which I have considered.

32. First, it is not uncommon for children who are victims of abuse to try to protect the abuser. Their desire to do so is a product of the manipulation that is part of the abuse. That may be a plausible explanation if the Claimant, aged 13 were to give an account that minimised the conduct of PXM.

33. Second, I accept the Claimant's evidence that as a child she felt embarrassed to admit to others that she had been infatuated with PXM. That again may be a good reason for differences between what she said at the time and later evidence.

34. Third, there are credible reasons for some differences on discrete issues. An example of this is the Claimant's explanation for messages found on her phone which had been exchanged with another adult male (who worked in Iceland) when it is her case that PXM was the sole focus of her attention during the summer of 2014. I accept her account as credible, that amongst teenagers there was some shared use of phones, depending on who had internet access at the time.

35. When assessing the reliability of her account, I distinguish between the possible explanations for what was said to others when the Claimant was aged 13, even though what she said might not have been true; and what she has said about those same circumstances after having resolved to bring a civil claim against the Defendant for damages. By then, she must have thought through what had happened in the past. She had decided to pursue litigation. She had thought about the events of her childhood with the maturity of an adult. Where her evidence has evolved during the litigation in a material respect, that inconsistency undermines its reliability.

36. When challenged about very recent developments in her account, the Claimant suggested that they are explained by undertaking therapy earlier this year. I do not find that explanation persuasive. There is no evidence to suggest that having therapy has made her recollection more reliable. There are matters about which her evidence has materially developed, and which are contained in a witness statement made very shortly before trial. These are principally the impact on her of a badminton club session at school that PXM attended; and her feelings about the "status" of PXM. These are factual issues on which great reliance is now placed. They have become central features of her claim. They were not so, earlier in the litigation. I set out below the way in which the evidence on these issues has evolved. I have not found her

evidence on these particular issues to be persuasive because of the very late development of this aspect of her case.

37. On 12 October 2019 the Claimant was interviewed and examined by Dr O'Neill, Consultant Psychiatrist, for the purposes of this claim. The relevant part of the Claimant's "Account of Abuse" is at paragraph 4:

"A trainee teacher PMX was from the outset very nice to MXX. He told her that, "He liked me and that all the crap and bullying at school didn't matter". MXX found him reassuring, felt there was someone who cared and was going to be there for her. She perceived he didn't want anything else from her and he wasn't going to hurt her. She began to trust him and they became friends on Facebook".

38. The other relevant passage is at paragraph 30 under the heading "Psychological Sequelae":

> "Having met PXM she considered him as her friend, protector, the only one she trusted…"

39. There is no reference there to the badminton session or any significance attaching to it. PXM is described wrongly by the medical expert as a "trainee teacher" but the Claimant's account does not suggest that it was his "position" or "status" that had an impact upon her.

40. In her Particulars of Claim dated 22 September 2020 she referred to these matters at paragraphs 8 – 10 as follows:

8. During the PE lesson, PXM suggested to the Claimant that she should attend a badminton club at the School to help her make friends. The Claimant duly attended the badminton club in the School's sports hall. The badminton club was supervised and/or instructed by a PE teacher at the school, GH, who was assisted by PXM as part of his duties at the School. Again, the Claimant appeared and was isolated and unhappy.

9. Having learned of the Claimant's isolation and vulnerability in the course of his duties at the school PXM set about befriending the Claimant. Such befriending, if done for legitimate purposes as it appeared to be, would have been valuable to the Claimant and in furtherance of and/or entirely consistent with PXM's duties at the school.

10. However, PXM was, in fact, taking advantage of the Claimant's vulnerability to manipulate her so as to create a dependency on him. PXM communicated increasingly frequently with the Claimant, including after he left his placement at the School and caused the Claimant to feel valued by PXM, isolated from her mother and that she needed PXM's emotional support."

41. Part 18 requests were raised about this part of the statement of case. The third request was the following:

"With the particularity to be relied on at trial, and precisely as possible, please give the following details:-

(a) What acts of "*befriending*" the Claimant contends that PXM undertook prior to the end of his placement. In relation to each such act please give details of (i) what happened, (ii) when it took place, (iii) where it took place, (iv) how and by what means it took place, (v) who, if anyone, was present at the time of such befriending, other than the Claimant and PXM.
(b) What communications the Claimant contends that PXM had with her prior to the end of his placement. In relation to each such communication please give details of (i) what was said, (ii) when the communication occurred, (iii) where such communication occurred, (iv) how and by what means such communication took place and (v) who, if anyone, was present at the time of such communication, other than the Claimant and PXM.

42. The Claimant replied on 11 December 2020 as follows:

> "The responses to each request made at this paragraph overlap significantly and will be dealt with concurrently. The Claimant recalls having brief interactions with PXM around the school during his placement. These were friendly exchanges, typically initiated by PXM smiling and saying hello to the Claimant. The Claimant noticed that PXM was taking a particular interest in her and appreciated his friendly and approachable demeanour. PXM spoke with the Claimant prior to the badminton lesson and suggested she attend. The Claimant's friend, Rhiannon [surname], was present. PXM suggested that attending the club would be a good way of making friends. During the badminton lesson, PXM was friendly and supportive towards the Claimant. The Claimant recalls feeling pleased that PXM had befriended her and that she was able to trust him."

43. The badminton club session is dealt with at paragraph 9 of the Claimant's first witness statement dated 22 August 2021 as follows:

> "On one of the final days of his training at the school I saw PXM talking to my friend, Rhiannon [surname]. I think this would have been late February 2014. He then called my name and told me to come over. I think that PXM must have asked Rhiannon what my name was because I had never spoken to him before. I had seen him around school and said hello, but this was our first conversation. He asked me if I wanted to play badminton after school as he ran the after school club. I told him that I did not know how to play badminton but PXM said that he would teach me to play. I went to the badminton club that afternoon and PXM stood behind me and showed me how to hold the badminton racket and hit the shuttlecock. He paid me a lot of attention which was nice because I was so unhappy at the time and was being bullied."

44. The Claimant does not in this witness statement make any reference to PXM having a status or position that had made any impact on her, other than to say at paragraph 12, "PXM wanted to be a PE teacher and I was also interested in physical activity and sports and wanted to be a personal trainer or physiotherapist and we bonded over this."

45. On 1 November 2021 Professor Mezey, a Consultant Forensic Psychiatrist and the Defendant's medical expert interviewed and examined the Claimant. The relevant part of her report under the heading "Experiences of Abuse" is at paragraph 21:

> "MXX said that when she met PXM at A Secondary School "I was already damaged … I craved attention … I needed to be loved." She said that PXM's interest in her and his kindness had made her feel "special". She said PXM had been "really nice …I felt that he genuinely cared about me … he made me feel better about myself … then I started to need him … he encouraged me to join the Badminton club …contacted him on Facebook (after he left) …we became friends." She thought it was probably the last day of the summer term, that PXM suggested to her that she joined the Badminton club. PXM then had left the school."

46. While there is reference to the badminton club session in this account, it does not assume any real importance. There is no reference to the Claimant regarding PXM's role or position at school as having any influence in her teenage infatuation with PXM.

47. It is not until her supplementary witness statement, signed on 23 June 2022, only days before trial, that more detail is given about the badminton club session. In paragraph 5 the Claimant says "PXM taught me badminton with around 10 – 15 other pupils but he mainly concentrated on spending time with me during the session". In paragraph 7 the Claimant says that PXM set up the room and put the equipment away at the end of the session.

48. In paragraphs 9 and 10 of the supplementary witness statement, the Claimant makes reference for the first time to her feelings about PXM's "status" and "authority":

> "9. I spoke to and messaged PXM because he was a somebody. He had authority at school and was someone important because he was a person with responsibility at school. It was nice to have someone important paying me attention as I felt I was a nobody due to the bullying I suffered at school.
>
> 10. I was taught to respect teachers and I saw him as a teacher and therefore someone I could trust. I was flattered that someone of his standing was interested in me."

49. Her evidence from the witness box on these issues was animated and developed further. She said that during the badminton session "he spent the majority of time with

me". "It was a massive moment for me." "I'd never had any intimacy, love, care. Having that was mindblowing. That's why it was such a big moment".

50. In cross-examination the evidence developed in this way:-

    Q You weren't sending him messages because he spent a week at school?
    A I was messaging him because he was somebody important that people respected and as pupils we were told to respect him. It was a massive thing. I felt important. He had such an important role and for him to like someone like me felt great. He made me feel so important."
    Q But he was nothing important.
    A He was going to be a teacher. He was at uni.
    Q You say he had authority. All you had seen him do was to help out in a badminton session.
    A We were told to treat him like a member of staff. He was older than me. I saw him like a teacher. He picked me. That's why I felt special. He chose me and that's why the relationship continued. This strong clever person who was going to be a teacher and who was doing a teaching role chose me.

51. A little later in her evidence she said, "When I first met him it was the reason he was important. He wasn't nobody. He was important who liked someone who was a no one."

52. The contemporaneous evidence is silent as to there being any significant impact on the Claimant of either the badminton club session or PXM's "position" at school.

53. The closest to any such reference is in AB's witness statement to the police in September 2014 when he refers to the Claimant being overheard in March "bragging" about "getting the number of a student PE teacher".

54. The only relevant reference in the Facebook messaging about the circumstances in which the Claimant first had any meaningful interaction with PXM reads as follows:

    MXX: ….I remember the first time I ever spoke to you:) omg xx

    PXM: When was that then Xx

    MXX: In school? Lunch, Wednesday was when I spoke to you, you were just so fucking hot:(and still are!! And I was ugly I look like trash in the uniform omg:,) I was like how old are you, you would [not] tell me so I asked daisy, the I was like omg only 4 years:,) then I ran off:.) Then I got closeoth daisy e.c.t xx

    PXM: I remembering you running of shouting it's not that much of an age difference haha Xx

    MXX: Omg:,) I had the biggest crush on you, I even had the fucking courage to talk to you again asking can you teach my set #TOP SET. Then you didn't: (xxxx

55. In her police interview on 30 October 2014, there is a passing reference to the badminton club session but no suggestion that it had any impact upon her:

> "MXX stated that on PXM's last day of School he asked her to play badminton as he run an after school club. She told PXM that she couldn't play and he told her that he would teach her.
>
> MXX stated that after this she found him on Facebook and had a browse through his information, MXX said that PXM then sent her a friend request which she accepted."

56. I accept there may be reasons why the Claimant might have understated matters or omitted important detail at this stage of her life. However there is no persuasive contemporaneous evidence that displaces my conclusion that the importance placed on the badminton club session and the influence of PXM's "status and authority" represent a very recent evolution in the Claimant's evidence, rather than a reliable recollection, albeit they may well be her current honestly held beliefs.

57. I therefore do not attach weight to her evidence on these issues.

58. For the Defendant, I heard oral evidence from AB, the Defendant's current Deputy Head Teacher who in 2014 was an Assistant Head Teacher; EF, the Defendant's current and 2014 Head of Student Support Services and a designated safe-guarding lead; and CD, the Head of the PE department in 2014 and currently an Assistant Head Teacher.

59. I gave permission for CD to give his evidence via video link. Unfortunately he had contracted coronavirus and was unable to attend the trial due to reasons of public health. Both parties agreed to his remote attendance in those circumstances.

60. I found all of the Defendant's witnesses to be straightforward, trying to assist the court. I accept their evidence, little of which was controversial.

61. EF made ready and appropriate concessions when cross-examined. In relation to one issue that post-dated the sexual assaults on the Claimant, she had made an error in recalling that the Claimant had made a false report to her of inappropriate conduct by a member of staff. In fact the report had come from the Claimant's mother, but I accept EF's evidence that she also discussed the matter with the Claimant who maintained the false account reported to EF by her mother. Although the conversation with the Claimant described by EF does not appear in her contemporaneous records, EF did record that she investigated the allegation by interviewing nine of the Claimant's fellow pupils before reaching the conclusion that the complaint was baseless. It is inconceivable that she would have interviewed nine pupils without discussing the matter with the Claimant; and it is equally implausible that she would have conducted such a detailed examination if the Claimant had not maintained the allegation.

Findings of Fact and Reasons

Background

62. PXM was born on 17 October 1995. He had attended the Defendant's school as a pupil, taking his GCSEs and then going on to college intending to train to be a PE teacher. He had been well thought of when attending the Defendant's school as a pupil and was considered by the staff to have exactly the sort of attributes that a PE teacher should have. He was sporty and motivated. He had never got into any trouble.

63. In November 2013 when just 18, PXM approached CD about doing some work experience at the Defendant's school. It was suggested that he put this in writing. On 21 January 2014 PXM sent an email to CD asking if it would be possible for him to do a placement within Defendant's school "for me to gain some work experience hours within the PE department". He suggested it would help him to get an insight into the world of teaching and he expressed a willingness to help with after school clubs, lunchtime clubs and sports teams. He said that the dates he had in mind were from 24 – 28 February.

64. The school had no hesitation in offering a placement to him based on their knowledge of him as a former pupil.

65. The Claimant transferred to the Defendant's school as a 13 year old Year 8 pupil on 5 December 2013.

66. She was a capable and intelligent pupil, placed in top sets or higher ability groups, including for PE.

67. She had experienced bullying at her primary and first senior school which had affected her emotional wellbeing and had prompted her move to the Defendant's school. She gives unchallenged evidence that she had reduced her dietary intake because she had been called fat; she had become withdrawn; and she had started to self-harm.

68. I accept EF's evidence that the Defendant knew that the Claimant had moved senior school in part because she had been bullied at her previous schools. I also accept EF's evidence that the Defendant maintained the confidentiality of its pupils. I find that when undertaking a WEP, PXM would not have had access to any private information about the Claimant and would not have known the circumstances of her becoming a pupil at the Defendant's school.

69. Having joined the Defendant's school, the Claimant formed friendships with only a small number of fellow pupils. EF saw the Claimant regularly to provide her with student support. She is probably correct in her observation that the Claimant had some "false friendships" and that there was some turbulence amongst the Claimant and her peers.

70. There is some contemporaneous documentary evidence from April 2014 that is equivocal on this issue. A letter from the Child and Adolescent Mental Health Service ("CAMHS") dated 17 April 2014 refers to the Claimant's difficulties at her previous

schools and that she has "settled well" at the Defendant's school and had "some friends, however has limited social activities and spends a lot of time isolated within her bedroom". A Family Assessment two months later on 5 June 2014 recorded, "she is struggling to make friends at school and this is an area of concern".

71. I do not accept though that in February 2014 she would have appeared as an obviously isolated and friendless child. On the Claimant's own evidence she had three friends at school including a friend, Rhiannon, who was in the top set with her in lessons including PE. The Claimant's friendship with Rhiannon was likely to have been relatively consistent and stable, bearing in mind that it was Rhiannon who reported the messaging to the Defendant when she became aware of it in September 2014.

72. On 10 February 2014 there is a documented incident of the Claimant having committed acts of self-harm by cutting her arms. The note made by EF says the following, "I asked if I could see her arms, she rolled up her sleeves and 30 – 40 thin cuts were apparent on the inside of both her arms from elbow to wrist, the cuts of her right arm had clearly bled recently and the dried blood was evident."

73. I accept the Claimant's evidence that she was self-harming by cutting her arms and the tops of her thighs virtually every day. That is supported by the Family Assessment report on 5 June 2014 which said, "She has been regularly self-harming although reports that she is now trying to draw instead and this has been working so far."

74. What is apparent from EF's report is that the Claimant's uniform had long sleeves which concealed the injuries to her arms unless the sleeves were rolled up. It is only when she was doing PE or attending a sports club and wearing sports kit that they would have been visible. The injuries to the tops of her thighs would not have been visible to others at school even then, because the Claimant wore leggings to do PE.

75. The Claimant accepted in her evidence that in February 2014 she was using makeup to conceal the scars made by the cuts. A message she sent to PXM on 6 August 2014 was consistent with this; and with her treating her self-harm as very private and not something she shared with others.

76. Her oral evidence is that she would have expected PXM to notice that she was self-harming. That is because when her arms were exposed, she said she would have had fresh cuts which would have likely torn open and bled with movement when playing sport. However she confirmed in cross-examination that she did not know if PXM was in fact aware of these injuries; and that by August when she sent him the Facebook message, she was not sure.

77. For the reasons set out below, I find that the only time during the WEP that PXM would have seen the Claimant dressed other than in her school uniform would have been at the badminton session on 28 February, when her arms would have been exposed. I reject the suggestion that he suggested she attend the club because he thought she was vulnerable.

78. It is possible that some self-harming injury was exposed at the badminton session. But I am not satisfied that the Claimant has proved that the marks would have been so obvious on that single occasion that PXM must have noticed them. The content of her messaging and her uncertainty from the witness box about whether he would have known is not consistent with that.

PXM's induction and the Defendant's expectations

79. Before starting the WEP, PXM attended an induction meeting with CD, who at the time was the Head of the PE Department. The meeting lasted about 45 – 60 minutes. CD discussed with PXM the Defendant's expectations and requirements for the WEP and other practical matters, such as the dates of the placement.

80. I accept and find that CD told PXM he would have to be with a member of staff, probably PE staff, at all times. He would not be allowed to be left on his own at any point. AB confirmed that the Defendant would have required PXM to be in the company of a member of staff who held an enhanced DBS certificate at all times. CD said that during break times the PE staff would be together in the PE staff office unless they were on duty or at a lunchtime club. He said PXM would not have accompanied staff on duty but could, if he wished, have joined them with club activities at lunch time.

81. I accept from CD that he had some personal involvement with the WEP but that PXM also accompanied other teachers to observe a range of teaching styles.

82. CD went through with PXM the Defendant's policies and guidance. This included "Guidance for safe working practices for the protection of all children, young people, vulnerable adults and staff at A Secondary School" which in its introduction stated that the guideline applied to "**all** [emphasis in the original] adults working or volunteering for the school whatever their position, role of responsibilities".

83. The Guidance covered "Power and Positions of Trust" which emphasised that "A relationship between a member of staff and a student cannot be a relationship between equals" and that "There is potential for exploitation and harm of vulnerable young people and staff have a responsibility to ensure that an unequal balance of power is not used for personal advantage or gratification."

84. There were other sections of the Guidance that warned against students becoming strongly attracted to a member of staff or developing an infatuation and directed the staff member to report anything of this sort. Under the heading "Social Contact", the Guidance provided that, "Staff should not establish or seek to establish social contact with students for the purpose of securing a friendship or to pursue or strengthen a relationship." When physical contact was necessary, for example in games or for music tuition, the Guidance provided that "Contact under these circumstances should be for the minimum time necessary to complete the activity and take place in an open environment."

85. PXM was required to sign a form headed "Staff Declaration" which confirmed that he had read the Guidance and understood his responsibilities for child protection at the Defendant's school. The declaration he signed was the same as for employed staff.

86. CD also referred PXM to the "Staff Code of Conduct". Under the heading "Introduction" the Code provided that it applied "to **all** [emphasis in the original] adults working or volunteering for A Secondary School whatever their position, role, or responsibilities." It applied across the entire spectrum of employees, independent contractors and those who did not fall into either category.

87. I accept CD's evidence that the Defendant's expectations of PXM were that he would provide some limited help with lessons by running warm ups, coaching groups of students under guidance, assisting with sorting out equipment, washing bibs and what CD referred to as "general day to day PE stuff." He explained that the Defendant's approach was to encourage its pupils to take responsibility for setting up and packing away PE equipment themselves so PXM would not be expected to have done much of that.

88. PXM was expected to attend at school from 8.15am until 2.40pm when the school day ended. After school clubs might run until 3.45pm. PXM's attendance at clubs was not compulsory but there was a strong expectation that he would attend.

89. I find, accepting CD's evidence that PXM would have been introduced to the pupils at the start of a class in which he was present along the lines of "This is Mr PXM who is on a WEP and should be treated as any member of staff should be. He is here to support in lessons".

90. The class teacher would have talked through with PXM what they wanted him to do by way of assistance, on a lesson by lesson basis. This could have been running a warm up, for example. CD's evidence was that "he would have a bit of information about what was happening" but there was no written lesson plan. The lesson would be delivered by the teacher and not by PXM.

91. PXM would always be supervised in the assistance he was providing to the class teacher. Part of the expectations of the WEP was that the teacher being shadowed would feed back to PXM anything he had done well and what more needed to be thought about for next time.

92. CD said that PXM was keen and "went the extra mile", wanting to learn as much as he could to prepare for a future career in PE teaching.

<u>Interaction between PXM and the Claimant</u>

93. I find that the Claimant has proved there were two occasions when she had some interaction with PXM that went beyond a smile or "hello" when passing each other moving about the school.

94. The first was when PXM suggested to the Claimant that she attend the afterschool badminton club. The second was the club session itself.

95. The Claimant has given different accounts of the first meeting.

96. There is contemporaneous evidence in her police interviews on 13 September 2014, 30 October 2014 and in a Facebook message on 6 August 2014.

97. The first handwritten police interview is brief. When the C is asked to "Tell us about PXM" the note reads "Came to our school, Yr 11- I was Yr 7, he came to our school for work experience and *taught my PE* (my emphasis). I am in A Secondary School. I was in year 8 when he came back."

98. The second police interview is more comprehensive.

99. At the start of it there is a summary in which it is recorded "MXX stated that her PE teacher is PXM; she met him when he first started working at her School".

100. However in the body of the interview there is a detailed account of why PXM did not teach any of the Claimant's lessons. She said that she "was in the high band sets and PXM taught the low band sets so they didn't have anything to do with each other whilst he worked at the school. It wasn't until his last day when he asked her to play badminton that they started talking." She said that PXM had been talking to Daisy, the sister of his best friend Tom just before they spoke. She thought that Daisy must have told him her name and he called her over and then asked her about playing badminton. She said she couldn't play and he told her that he would teach her.

101. This account is more likely to be correct because of the detail given.

102. The Facebook message about the first time the Claimant says she spoke to PXM has been quoted earlier in this judgment. It is consistent with the police interview insofar as it mentions Daisy being present. The Claimant says she asked PXM his age but he refused to tell her and it was Daisy who told her before she "ran off". There is then a reference to her "talk[ing] to you again" asking for PXM to teach her set but that he did not do so. That supports the information given to the police that PXM did not teach the Claimant in a PE class.

103. It is not until much later that the Claimant suggests that the conversation about the badminton club took place in a PE lesson. Her first witness statement is the first time she suggests that Rhiannon was present and was the person who gave her name to PXM.

104. In her oral evidence she raised the possibility of the conversation being in the playground near a tree although she frankly accepted that she was not sure. From the witness box she was adamant that PXM had taught her in a PE lesson and for the first time provided the additional detail that it was a dodgeball lesson.

105. For the reasons already given I attach greater weight to the contemporaneous evidence that to what has come much later.

106. I find that PXM did not undertake any of his WEP in any of the Claimant's PE lessons. That position is consistent with the police interview and the Facebook message. Even if the Claimant had wanted to minimise her contact with PXM when talking to the police about him, she would not have done so in the unguarded messages.

107. I find that they had some conversation that led to the Claimant attending the badminton club. It is likely that this occurred at lunch time, despite the school policy that PXM should be with PE staff at all times. I am satisfied that Daisy was present. The detail given to the police about the friendship between PXM and Daisy's brother is difficult to understand unless it were true.

108. I find that this conversation was either on 26 or 28 February and was the first meeting between the Claimant and PXM, other than inadvertent passing contact around the school.

109. Nothing untoward occurred. PXM suggested that the Claimant attend the badminton club. He refused to disclose his age when she asked him. It was a brief meeting.

110. I find that this was not grooming behaviour. I am not satisfied there is evidence from which it could reasonably be inferred that PXM had any ulterior motive during this first interaction with the Claimant.

111. The Claimant does not persuade me there was any further interaction between them before the badminton club session. If the Facebook message on 6 August does refer to another meeting ("talk[ing] to you again"), it was not such as had any sufficient impact on the Claimant for her to rely on it as part of her case. The Facebook message in any event suggests that if it occurred at all, it was fleeting with nothing untoward occurring. It cannot reasonably be inferred that PXM had any ulterior motive towards the Claimant during this brief meeting.

112. I am satisfied that the badminton club took place on Friday 28 February after school. It was supervised by a teacher whom the Claimant believes was GH. CD says there was a rota amongst the PE staff for taking the club. It is likely that GH was the teacher in charge.

113. I am satisfied that PXM attended the club as part of his WEP because there was an expectation on the part of the Defendant he would do so, because he was keen to maximise the experience he would gain from the WEP and probably also to make a good impression. It is likely that he was already planning to attend the club before he spoke to the Claimant about it.

114. PXM was supervised for the duration of the club. There is no suggestion that GH, an experienced teacher, was not present at all times.

115. PXM assisted the Claimant to play badminton. That was the purpose of the club.

116. The Claimant does not satisfy me that the interactions between herself and PXM at the badminton club amounted to grooming behaviour. There is no sufficient basis to infer that by this time PXM was engaging with the Claimant for any ulterior purpose.

117. In reaching that conclusion I have attached weight to the following factors.

118. Firstly, on my findings PXM had had only a brief and inconsequential meeting with the Claimant once previously, either earlier that same day or a couple of days before. No part of the badminton club did or would have been expected to afford any opportunity for a private meeting. All pupils attending the club were together in the sports hall. The club was supervised throughout by an experienced staff member whom PXM was likely to want to impress. There is no suggestion that any objectively untoward or unusual activity occurred. The Claimant does not suggest that anything was said or done to her that was not entirely in keeping with the legitimate activity being pursued.

119. That is flimsy evidence from which to infer that PXM conducted himself during this second meeting with the intention of encouraging the Claimant to have an illicit relationship with him or to engage in any sexual activity. I am sure that there came a time when his intentions towards the Claimant changed, but I am not satisfied that the badminton session was any more than it appeared.

120. Secondly, for the reasons I have set out earlier in this judgment, I am not satisfied that at the time, the Claimant regarded the badminton club as a particularly significant event. It was not until her second witness statement made very shortly before trial that the Claimant first suggested that PXM had "mainly concentrated on spending time with me during the lesson" and it was not until her oral evidence that she spoke of the "massive" impact that this had had on her.

121. I find that PXM did not carry out any grooming activity at this second meeting with the Claimant nor at any time while undertaking his WEP with the Defendant.

122. By 5 March 2014 the Claimant and PXM had a social media connection because they had become Facebook friends. It is not suggested that there was any social media contact between the Claimant and PXM before he had completed the WEP and I find accordingly.

123. I am not satisfied that the Claimant was influenced by any perception of PXM having a status at the Defendant's school. For the reasons already given I do not find her evidence on this issue persuasive. The contemporaneous messages are more consistent with an infatuation influenced by PXM being an older, physically attractive teenager.

124. On 14 April 2014 the Claimant took an overdose of cocodamol tablets. That in itself had no connection with the facts of this case but it is undoubtedly a very significant and distressing event for the Claimant and those who cared about her. It can fairly be regarded as a landmark when trying to date other events so long after they occurred.

125. When the Claimant made her first witness statement she referred to the April incident as being after she had met PXM but before they started talking regularly. In her oral evidence she described it subtly differently as there having been regular contact between them but not on a daily basis prior to mid-April.

126. The contemporaneous evidence in her police interview in October refers to her having met up with PXM "after about a month of talking on facebook". As I have found the meeting was in August (for reasons set out later in this judgment), this would place the "talking on facebook" in or around July.

127. When the Particulars of Claim were drafted, the claim alleged (in error) that PXM had been at the Defendant's school "in the summer term of 2014" (paragraph 3) and "in about June 2014" (paragraph 5). There was then described escalating activity with the abuse of the Claimant continuing "until about August 2014". The references to summer and June are now recognised to be wrong, but it is apparent that the Claimant had in her mind when instigating the claim, a sequence of events that lasted two to three months, and occurred during the summer.

128. While I recognise there is a good reason why, when interviewed by the police, the Claimant might have wanted to minimise her contact with PXM because she still had strong protective feelings towards him, what she said then is consistent with the duration and time of year of the activity pleaded in her statement of case.

129. Relying on that chain of evidence, I do not find the Claimant has discharged the burden of proving that before late April 2014 at the earliest there was any significant communication between her and PXM, either in content or frequency. It is unlikely that the messages contained any manipulative or exploitative content before mid-April when they became more frequent. There is also some inherent unlikelihood that as an 18 year old, PXM would have waited until August before arranging to meet the Claimant face to face if the messaging was intense and sexually motivated as early as March or April.

130. It is not possible to say when PXM told the Claimant to delete the messages he sent her, other than that it was before July 2014. The reason for his instruction was, on the balance of probabilities, that PXM wanted to avoid the messages being discovered by any third party. It is a reasonable inference to draw that by that time the messages had become sexually motivated and explicit. It is not possible to know whether by that stage PXM had in mind sexual gratification only through the exchange on social media of explicit sexual material or whether he was then planning sexual activity with the Claimant. Whichever were his intentions, they were no formed until after mid-April.

131. The Claimant's evidence is that 4 July was the first time that PXM sent her indecent images over Facebook messenger. There is no evidence to contradict her account which I accept.

132. I find that apart from the interactions at the Defendant's school in February, the Claimant and PXM first met up in person on 2 August at Seafield Park. PXM committed a serious sexual assault against the Claimant at that first meeting.

133. I fix the date of first meeting for these reasons.

134. The Claimant's own evidence is that she did not communicate with PXM other than through Facebook messenger. She did not meet him other than when sexual abuse took place. It is her evidence that the first time this occurred was at Seafield Park. There is clear reference in the messaging to them arranging to meet near to the swings in the park on 2 August. PXM appears to be unfamiliar with the location. At 9.45am on 2 August he messaged, "I don't even know where this place is. Sea fields park yeah?" If PXM was unfamiliar with the location, then it is not likely he had met the Claimant there before.

135. The Claimant does not suggest any earlier or different first meeting in her evidence.

136. I find that PXM met the Claimant next, a few days later, on 5 August 2014 at a field with adjoining woodland known locally as "Tipsy". The timing of this meeting is supported by references in the Facebook messages.

137. I do not make findings about whether there were, in addition to these meetings, other subsequent occasions when the Claimant met with PXM and sexual assaults occurred. As quantum has been agreed subject to liability I do not need to make further findings on this issue.

138. There is no dispute that the form the sexual abuse took was that PXM penetrated the Claimant's mouth with his penis, penetrated her vagina with his mouth and digitally penetrated her vagina.

139. The Claimant's friend, Rhiannon became aware of the Facebook messages and reported them to the Defendant on 10 September 2014. The police were informed the same day. PXM was arrested for sexual crimes committed against the Claimant.

140. On 13 September the police made an initial visit to the Claimant. A short interview was conducted which was recorded in handwritten notes.

141. On 30 October the police conducted a tape-recorded interview of the Claimant which lasted for 39 minutes.

142. On 2 November 2015 PXM pleaded guilty to at least part of an indictment that alleged crimes of engaging in sexual activity with a child by penetrating the Claimant's mouth with his penis (count 2) and penetrating the Claimant's vagina with his fingers (count 3); and to two counts of causing a child to watch a sexual act by looking at an image of a person engaging in sexual activity. It is likely this refers to videos sent by PXM to the Claimant through Facebook messenger.

143. It is unclear from the Memorandum of Conviction whether PXM admitted other sexual crimes alleged in the indictment or entered not guilty pleas to the remaining counts with them being left to lie on the file. For the purposes of this litigation, that question need not be resolved.

What torts did PXM commit against the Claimant?

144. Vicarious liability is a contingent liability. The Defendant can only be vicariously liable for torts that are proved to have been committed by PXM as the primary tortfeasor.

145. Two torts are alleged.

(i) Assault and battery

146. I adopt and apply the definition of these torts from Clerk & Lindsell on Torts, 23rd ed (2020):

> "The direct imposition of any unwanted physical contact on another person may constitute the tort of battery" (Paragraph 14-09).
>
> "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on his person" (paragraph 14-12).

147. The Defendant does not dispute that PXM committed acts of assault and battery at the time he sexually abused the Claimant. The Claimant does not argue that these torts were committed on any earlier date.

148. I am satisfied that these torts were committed against the Claimant on 2 and 5 August. It is possible that they were committed on other later occasions also.

149. 2 August is the first time that the Claimant and PXM met when sexual activity occurred. A battery occurred each time he committed a sexual assault on her. An assault immediately preceded each battery.

(ii) Intentional infliction of harm

150. The modern restatement of the rule in *Wilkinson v Downton* [1897] 2QB 57 is found in the judgment of the Supreme Court in *Rhodes v OPO* [2015] UKSC 32. The Court identified three elements of the tort: "a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse, b) the mental element requiring an intention to cause at least severe mental or emotional distress, and c) the consequence element requiring physical harm or recognised psychiatric illness."

151. Recklessness is not sufficient for the mental element (paragraph 87). Intention may be inferred as a matter of fact and there may be "consequences or potential consequences [which] are so obvious the perpetrator cannot realistically say that those

consequences were unintended"[1]; but it cannot be imputed in the sense that a person cannot be taken as a matter of law to intend the natural and probable consequences of his acts (paragraphs 45 and 81).

152. The approach taken by Courts when considering cases of grooming behaviour (that is, conduct that may be objectively unobjectionable but is part of a process of building a relationship for the purpose of manipulation, exploitation and abuse, often sexual) is to consider the entirety of that conduct rather than to separate it from the sexual abuse that causes injury. That was the approach taken in *X & Y v London Borough of Wandsworth* 2006] EWCA Civ 395 in the context of negligence; and in *ABC v WH & Whillock* in the context of the conduct element of the intentional infliction of harm). In both cases the court sought to identify the point at which the grooming behaviour started, with reference to the ulterior motive of the primary tortfeasor.

The Arguments

153. Mr Levinson argues that PXM identified the Claimant as vulnerable and started to groom the Claimant during their interactions at the Defendant's school. That conduct continued through the social media contact, escalating until the sexual assaults occurred. He invites me to regard the entirety of the interactions between them as part of a process of manipulation and exploitation leading to sexual abuse which was unjustified and intended to cause, at least, severe distress, and did cause injury.

154. Mr Owen argues that this tort requires all three elements to be present. He argues that the conduct element was not satisfied during the WEP and not until the messages became overtly sexual. It is not proven that PXM ever had the intention required to satisfy the mental element, or if he did, it cannot have been until after mid-April and long after the WEP had ended. The consequence element, if satisfied at all, was not present until the sexual assaults actually occurred.

Analysis

155. I am satisfied the on the balance of probabilities the Claimant has discharged the burden of proving that this tort was committed against her by PXM.

156. This tort was first complete at the time that sexual activity took place on 2 August.

157. At that point there could be no justification or excuse for PXM's conduct towards the Claimant. His intention to cause her at least severe emotional distress can be properly inferred. By then, the Claimant had told him through the messages that she

[1] See *ABC v WH & Whillock* [2015] EWHC 2687(QB), for example, where the court said of a teacher who had groomed and then sexually abused a vulnerable pupil aged 16, "it was obvious that the illicit relationship would in the end cause nothing but harm to the vulnerable Claimant some 39 years younger than her groomer and those consequences must have been entirely clear and obvious to Mr Whillock".

had been self-harming and had other emotional problems. He had lied to her about the relationship he had with his girlfriend.

158. It must have been obvious to PXM, even allowing for his youth, that severe emotional distress would be caused to a child with the additional vulnerabilities of which he was by then aware, if he met with her illicitly for sexual activity to take place. Even if her distress were not to be immediate, it was virtually inevitable.

159. There is an issue between the medical experts as to whether the Claimant suffered a recognised psychiatric illness as a consequence of the sexual activity that took place. There is no sufficient evidence to show or from which it can be inferred that she sustained physical harm from the sexual abuse.

160. Dr O'Neill, who interviewed and examined the Claimant on 21 September 2019 is of the view that the Claimant developed complex Post Traumatic Stress Disorder ("PTSD") caused by PXM's abuse of her. The Claimant described to her experiencing symptoms of hypervigilance, flashbacks and avoidance behaviours. These features supported her diagnosis. Her prognosis was of substantial improvement and a reduction in the particular symptoms described to her by the Claimant, referred to above, after eighteen months of psychological therapy.

161. Professor Mezey interviewed and examined the Claimant two years later on 11 November 2021. By that time the Claimant had been in a supportive and loving relationship for two years. She did not note any of the clinical features of complex PTSD that Dr O'Neill had identified. She disagrees with this diagnosis; or that PXM caused the Claimant to experience any mental illness.

162. As quantum subject to liability has been agreed I have not had the opportunity to hear evidence from the medical experts. There are fundamental differences in their opinions. However their joint statement acknowledges that the two year gap between examinations, during which time the Claimant had been in a settled relationship, might account for differences in the Claimant's clinical presentation between the two examinations. It is perhaps also significant that the two year gap is longer than the period Dr O'Neill opined for improvement, albeit with the benefit of psychological therapies.

163. Ultimately, whether or not the consequence element for this tort is satisfied does not advance the claim. That is because of my conclusions about the timing of the other elements of the tort (that is, that they were not present until well after the end of the WEP); and my conclusions set out later in this judgment about vicarious liability. I do though accept that there is sufficient evidence from Dr O'Neill's report to conclude that the Claimant was, on the balance of probabilities, caused a recognised psychiatric illness by PXM's abuse of her.

164. Having taken the position most favourable to the Claimant, the consequence element would have been present no earlier than the time at which sexual activity took place. Dr O'Neill's diagnosis relies on "exposure to an event or series of events of an extremely threatening or horrific nature, most commonly prolonged or repetitive events from which escape is difficult or impossible (e.g. torture, slavery, genocide,

prolonged domestic violence, repeated childhood sexual abuse or physical abuse)". Until the Claimant met with PXM at the time he caused her to engage in sexual activity, the messaging alone was not sufficient to meet that criteria.

165. It follows that neither the completed tort nor any element of it was committed during the WEP.

166. Even taking the broad view submitted by Mr Levinson, the effect of my findings of fact are that PXM did not engage in any grooming of the Claimant during the WEP and their interactions at the Defendant's school. I am not satisfied it is proved that PXM had the intention of exploiting or manipulating the claimant for the purpose of sexual abuse from the outset.

167. It is impossible now from the evidence available to identify the point during the Facebook messaging that PXM's state of mind changed. It can reasonably be inferred that it was later than mid-April before which there was no significant social media contact; but earlier than 4 July when he sent the sexual images of himself and told the Claimant that he loved her.

168. I am fortified in my conclusion by the fact that no meeting between them took place until August, despite PXM having access to a car (that he drove to their first meeting). That tends to suggest that his intention to persuade the Claimant to meet for sexual activity to take place was not formed until a later stage of the messaging.

169. The conduct and mental elements of the tort on the balance of probabilities were not present until many weeks after the WEP had ended.

Vicarious Liability

170. Counsel are substantially agreed as to the legal framework to establish vicarious liability. They disagree about how it should be applied to the facts of this case.

171. There is a two stage test for the imposition of vicarious liability. It is set out in the judgment of Lord Phillips in *The Catholic Child Welfare Society v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56 at paragraph 21. It has been quoted and applied in numerous subsequent cases:

> "i) The first stage is to consider the relationship of [the Defendant and the primary tortfeasor] to see whether it is one that is capable of giving rise to vicarious liability.
>
> ii) … What is critical at the second stage is the connection that links *the relationship between [the Defendant and the primary tortfeasor]* and the act or omission of the primary tortfeasor, hence the synthesis of the two stages."

172. The test has been revisited and somewhat refined by subsequent decisions of the Supreme Court in *Cox v Ministry of Justice* [2016] UKSC 10 which deals mainly with the first stage of the test; *Mohamud v Wm Morrison Supermarkets PLC* [2016] UKSC 12 which deals mainly with the second stage of the test; and then by *Barclays Bank PLC v Various Claimants* [2020] UKSC 13, dealing with the first stage; and *Wm Morrison Supermarkets v Various Claimants* [2020] UKSC 12, dealing with the second stage.

173. The Court of Appeal decided *Blackpool Football Club Limited v DSN* [2021] EWC CIV 1352 after the Supreme Court decisions and reviewed the authorities (per Stuart-Smith LJ).

174. Very recently, Johnson J in *TVZ v Manchester City Football Club Limited* [2022] EWHC 7 (QB) analysed the authorities on each stage of the test, taking the authoritative statements of principle from the 2020 Supreme Court decisions.

175. I have been helpfully referred to all of these decisions.

The First Stage

176. Although there must ultimately be a synthesis of the two stages of the test, the starting point is the first stage.

177. As PXM was neither an employee of the Defendant nor an independent contractor, the first question to address is whether he was in a relationship with the Defendant that was capable of giving rise to vicarious liability. Was he in a relationship with the Defendant that was "akin to that between an employer and an employee"[2].

178. In *Cox v Ministry of Justice*, when emphasising the need to take a broad view of a Defendant's enterprise or business as incorporating any undertaking and not simply a commercial one, Lord Reed described the relationship in this way, "It is sufficient if there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by assigning those activities to him, have created a risk of his committing the tort."

179. When considering "benefit", there is no need for it to be a commercial benefit or profit; nor need there be an alignment between the objectives of the Defendant and the primary tortfeasor. The benefits of the relationship to each may be different (*Cox v Ministry of Justice* at paragraph 35).

180. The imposition of vicarious liability does not depend on payment, nor the classification of the relationship for taxation or national insurance purposes (*Cox v Ministry of Justice* at paragraph 11).

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[2] *The Catholic Child Welfare Society v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools* at paragraph 47

181. The focus of the Court's enquiry is the nature of the primary tortfeasor's job and the nature of the function or field of activities entrusted by the Defendant to the primary tortfeasor (*Mohamud v Wm Morrison Supermarkets PLC* at paragraph 44).

182. In *Barclays Bank v Various Claimants,* Lady Hale referred back to the five "incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant" identified by Lord Phillips in *The Catholic Child Welfare Society v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools*, namely:

(i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;

(ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;

(iii) The employee's activity is likely to be a part of the business activity of the employer;

(iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;

(v) The employee will, to a greater or lesser degree, have been under the control of the employer.

183. The five "incidents" were said to be helpful in doubtful cases to identify a relationship which is sufficiently analogous to employment to make it "fair, just and reasonable to impose vicarious liability" but they are the policy reasons for imposing vicarious liability and not the principles themselves. (*Barclays* paragraphs 16 – 20 and 27).

<u>The Arguments</u>

184. Mr Levinson argues that the salient features of the relationship between the Defendant and PXM are akin to one of employment. He argues that all features of an employment relationship save for salary are present. He relies on the following factors:

a. The Defendant agreed that PXM could come into its school;
b. The Defendant set out at PXM's induction the terms on which PXM would be in its school; those terms accorded with those that applied to other staff members;
c. The Defendant regulated many aspects of its relationship with PXM, such as his hours of attendance and the Defendant's expectation that he would attend afterschool clubs, just as the Defendant's employees were expected to;
d. The Defendant supervised, directed and controlled PXM's activities within its school; it directed what he did and how he did it;

e. PXM was held out to the Defendant's pupils as a staff member; they were told to address him and treat him as they would a staff member; PXM spent his break time with the staff;
f. The activities performed by PXM (running warm ups or taking small groups under supervision, for example) were consistent with the work of a PE teacher or classroom assistant, albeit not as extensive; the activities undertaken by PXM were of benefit to the Defendant.

185. Mr Levinson argues that PXM was assigned tasks by the Defendant which were performed as an "integral part of the Defendant's business" and for the Defendant's benefit. The relevant part of the Defendant's "business" was to provide education for its pupils. The activities PXM had assigned to him during the WEP were consistent with this "business". The performance of those activities benefitted the Defendant when discharging its educational function.

186. He draws attention to contemporaneous descriptions of PXM by pupils and staff as "working" or "teaching" at the school to emphasise that the WEP was seen by others at the time as akin to employment.

187. Mr Owen takes the opposite position, relying on these factors:

a. The WEP was for work experience and not work;
b. It was intended to last for one week only;
c. The WEP was not for the benefit of the Defendant, but rather a mandatory part of PXM's course which the Defendant was willing to support;
d. PXM performed a limited role under continual supervision;
e. PXM was not incorporated into or integral to lessons, but rather had a primarily shadowing role and would "help out" only under supervision;
f. The policy documents the Defendant required PXM to sign at his induction applied to any adult who was employed, commissioned or contracted to work with children in any capacity on the Defendant's site; they were not applicable only to those persons who were in an employment or employment-type relationship with the Defendant;
g. PXM's presence made the Defendant's operation of the school more onerous; it was not the purpose of either the Defendant or PXM that he would undertake useful work for the Defendant;
h. Where, as here, there is no directly analogous relationship which has previously been held to be akin to employment, the court should stand back and consider whether it would be fair, just and reasonable to do so in this case; the circumstances point away from that conclusion.

Analysis

188. My conclusion is that this was not a relationship akin to employment.

189. PXM had approached the Defendant, asking for the opportunity to spend one week as a WEP in the Defendant's school. He was, in effect, asking for a favour and that was how the Defendant treated his request.

190. AB confirmed that the Defendant was prepared to agree to PXM's request because they knew PXM as a former pupil and believed at the time that he was a suitable candidate for a career in teaching. The Defendant wanted to encourage and support a former pupil in his further education at college.

191. PXM was aged only 18. He was unqualified. The purpose of the WEP was for PXM to learn from the Defendant's teachers. When viewed from the Defendant's perspective it was an altruistic gesture. It cannot have been intended that the Defendant would derive benefit from the presence of PXM in any real sense, notwithstanding that PXM performed some minor ancillary tasks during the WEP.

192. Throughout the WEP, the Defendant had to ensure that PXM was supervised by its staff at all times. He had to be closely directed in any activity he undertook with the pupils. As CD explained, the teacher he was observing would be expected to engage with him and provide feedback for any task PXM undertook. He was never given nor was it intended that he would have any responsibility for the teaching or other care of the Defendant's pupils.

193. There is force in Mr Owen's observation that a student at PXM's stage imposed a burden on the Defendant rather than any benefit. To that end it is perhaps instructive that the Defendant school no longer offers WEPs at all.

194. The position was very different from that in *Cox v Ministry of Justice* where the prison derived real and identifiable benefit from the work of the prisoners in its kitchen, notwithstanding that there was also a benefit to the prisoners that was different in kind.

195. The Defendant's requirement that PXM should understand and accept its policies for safeguarding applied to any adult coming onto the school site and engaging with its pupils. It is a neutral factor when considering whether the relationship was akin to employment.

196. The fact that the pupils were required to treat PXM with respect while he was undertaking the WEP is similarly a neutral factor. It reflects the ethos of the school, that respect should be shown to all, particularly adults, rather than being intended to bestow on PXM any authority or hold him out as having an authority that he did not have.

197. I reject Mr Levinson's submission that PXM's role was integral to the Defendant's business. The very limited role he played in the school's activities barely went beyond his own learning. Shadowing or observing, while not incompatible with employment, is generally a precursor to the performance of a role within an employer's organisation. It forms part of the preparation and/or training of an employer. Here, the observation and shadowing was the end and not the beginning. Neither side of the relationship expected that it would lead to more. The WEP was always understood to be for no more than one week. There was no real degree of integration into the Defendant's business.

198. It is artificial to describe PXM as performing a teaching role or even that of a classroom assistant. He had no independent responsibility for any aspect of the Defendant's undertaking. He did not ever, nor was it ever intended that he have pupils entrusted to his care to any extent.

199. I accept Mr Owen's submission that it would not be fair, just or reasonable to conclude that a WEP with the Defendant of one week's duration in these circumstances amounted to a relationship akin to employment.

200. My conclusion is that this is not a doubtful case. But if I am wrong in that conclusion, I have considered Lord Phillips' five "incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant".

201. The Defendant undoubtedly has more funds than PXM to compensate the Claimant. Having deep pockets of itself has often been said not to be a principled reason to found liability.

202. The tort was not committed as a result of activity being undertaken by PXM for the Defendant. It was committed well after the WEP ended. The sexual grooming and assaults had no connection with the Defendant's activity.

203. PXM's activity within the school was not in any real sense part of the Defendant's business activity. PXM was undertaking the WEP to learn from the Defendant's staff who were supporting PXM in pursuance of his own studies. The limited tasks PXM performed were minor and ancillary to the Defendant's undertaking, not integral to it.

204. The Defendant did not create the risk of PXM committing the tort. The most that that the Defendant did was to provide PXM with the opportunity to meet its pupils.

205. While undertaking the WEP, PXM was under the Defendant's control to the extent only that he had agreed to comply with its policies and was directed in the performance of any task. He did not owe the Defendant any duty of loyalty. He was not obliged to do anything and could have refused an instruction with no consequence, other than that the WEP would probably have come to a premature end.

206. The weight of these factors fortifies my conclusion that this was not a relationship akin to employment.

207. In case I am wrong about that, I have gone on to consider the second stage of the test for vicarious liability.

<u>The Second Stage</u>

208. This requires a sufficiently close connection to be established between the relationship between the tortfeasor and the Defendant, and the wrongdoing perpetrated against the Claimant, such that the "wrongful conduct may fairly and properly be regarded as done by the [tortfeasor] while acting in the ordinary course of

the firm's business or the employee's employment" (*Wm Morrison Supermarkets PLC v Various Claimants* approving the test set out in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48).

209. The "close connection test" is modified or tailored in cases concerned with the sexual abuse of children, because such activity "cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victim, which he has abused" (per Lord Reed in *Wm Morrison Supermarkets PLC v Various Claimants).*

210. *Lister v Hesley Hall* [2002] 1 AC 215 (HL) provides particularly helpful guidance for the application of the test in the context of sexual abuse. The House of Lords considered not only the position on the facts of *Lister* itself, but also two decisions of the Supreme Court of Canada, the facts of which were considered to lie on either side of the line for deciding whether vicarious liability should attach.

211. In *Lister,* the Defendant owned and managed a residential school. A warden was employed by the school to take care of the boys residing there. He sexually abused the boys entrusted to his care. Vicarious liability was established . The House of Lords referred to the sexual abuse being "inextricably interwoven with the carrying out by the warden of his duties." The warden had been given authority in the supervision and running of the residential accommodation and had some particular responsibilities. His role was to perform a function in relation to the boys that was the Defendant's responsibility to discharge, and which had been delegated to him by the Defendant.

212. The Court distinguished the warden's position from that of a groundsman at a residential school in respect of whom there would not be sufficient connection to establish vicarious liability. Lord Millett identified as crucial the fact that the Defendant had entrusted the care and welfare of the boys for whom it was responsible to the warden. He was in a special position because the Defendant had delegated to him the discharge of its own responsibilities. He had more than simply the opportunity to commit sexual assaults, which would also have been available to a groundsman.

213. Lord Steyn referred to the two Canadian cases (*Bazley v Curry* 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71) in this way, "I have been greatly assisted by the luminous and illuminating judgments in [*Bazley* and *Jacobi*]. Wherever such problems are considered in future in the common law world these judgments will be the starting point."

214. *Bazley* was a case on similar facts to *Lister*. The Defendant employed the tortfeasor within a children's home to discharge caring responsibilities. A sufficiently close connection was found to establish vicarious liability.

215. In *Jacobi* no such sufficiently close connection was found. The tortfeasor in *Jacobi* was employed by a children's club. His responsibility was to organise

recreational activities and outings. He was encouraged to form friendships with the children who attended the club. Children from the club visited him at home out of hours and he sexually assaulted them.

216. The Court emphasised the nature of the club's activities - that they took place in the presence of others, volunteers and members of the club. The opportunity afforded by the club for the tortfeasor to abuse "whatever power he may have had" was slight. It could only succeed if he subverted the public nature of the activities by isolating the victims from the activities of the club.

217. Many of the factors identified by the Court as supporting its conclusion that the connection between the tortfeasor's relationship with the Defendant and the commission of the sexual assaults was not sufficiently close to found vicarious liability resonate with the facts of this case. In *Jacobi* the Defendant's activities provided an opportunity to work with children but there was no element of intimacy envisaged in the relationship between the children and the tortfeasor. The tortfeasor had occasional physical contact with the children, through supporting them in the club's activities, but none of this was of a nurturing or intimate character. The Defendant did not allow the tortfeasor to be alone with the children. Engagement with the children outside the scope of the Defendant's activities by inviting them to his home was unauthorised and antithetical to the moral values promoted by the Defendant.

218. In *Blackpool Football Club v DSN* [2021] EWCA Civ 1352 the Court of Appeal quoted from *Lister* and emphasised two important points that were established. "First, the fact that an employer's enterprise creates a foreseeable risk and gives the employee the opportunity to commit sexual abuse is not sufficient to justify the imposition of vicarious liability on the employer. Second, the additional feature that justifies the distinction between the groundsman and the warden of the residential home is that the warden has been employed to discharge the schools responsibilities to the children who have been entrusted by the employer to his care" (at paragraph 69).

219. Having reviewed Lord Phillips' discussion in *The Catholic Child Welfare Society v Various Claimants and The Institute of the Brothers of the Christian Schools and Others,* the Court of Appeal in *Blackpool Football Club v DSN* said this, "To my mind the significant features of this formulation go beyond the simple requirement of a "strong" or "close" connection between the risk created by the employers enterprise and the wrongful act. In addition the formulation involves a) "placing" the abuser in their position, (b) using them to carry on its business and c) thereby significantly increasing the risk created by the employer's enterprise. Both (a) and (b) imply a degree of control and direction of the abuser by the "employer".

220. The close connection, if established, is not necessarily broken only by reason of the wrongdoing happening out of hours, away from the place of employment or continuing after the employment has come to an end.

221. In *X & Y v London Borough of Wandsworth* [2006] EWCA Civ 395, for example, the tortfeasor had been given a degree of pastoral responsibility for the children he went on to abuse. The acts of grooming in relation to the children which led on to the sexual assaults began at the employer's premises. The fact that the sexual acts then occurred away from the Defendant's premises did not of itself sever the connection on which vicarious liability was founded.

222. In *London Borough of Haringey v FZO* [2020] EWCA Civ 180, the trial judge (whose decision was upheld) had concluded that assaults that occurred after the tortfeasor had left his employment were "a continuation of the behaviour that commenced while and because the first defendant was a teacher." The later conduct was described as "indivisible" from what had occurred while the claimant had been a pupil at the school. The ending of the employment relationship had not in those circumstances severed the close connection necessary for vicarious liability.

The Arguments

223. Mr Levinson submits there is here a sufficiently close connection between PXM's relationship with the Defendant and his wrongful acts committed against the Claimant.

224. Many of his submissions are predicated on a finding of fact that PXM began to manipulate the Claimant during the WEP. I have rejected that factual conclusion. Instead I have found that manipulative conduct began at a later stage, on the balance of probabilities no earlier than mid-April and so at least six weeks after the WEP had ended.

225. I have considered the substance of his submissions in the context of the factual findings I have made.

226. Mr Levinson submits that a broad approach should be taken to the wrongdoing so as to include all of PXM's manipulative and exploitative behaviour; and should not focus on the sexual assaults committed at the time the torts are complete. He argues that it is the conduct leading up to the sexual assaults which is the conduct closely connected with the "teacher/pupil" relationship. He supports this by reference to the Defendant's policy documents which PXM was required to read and sign; and which anticipated the risk that PXM would behave exactly as he did towards the Claimant. He argues that the misuse of position through manipulative or exploitative behaviour is what ultimately facilitates the sexual assault. It is therefore that conduct that should be the Court's focus.

227. Mr Levinson argues that the Defendant placed PXM in a relationship equivalent to a teacher/pupil relationship with the Claimant. PXM had physical proximity and authority over her. The Defendant created the risk of what followed by enabling PXM to foster a relationship with the Defendant's pupils. The subsequent manipulation and exploitative conduct then abuse arose out of a field of activity entrusted to PXM.

228. He argues that such conduct flowed from the abuse of the position enjoyed by PXM because he held a position of authority at the Defendant's school. It is irrelevant that the tort was committed after the employment relationship has ended. What is key is that the manipulative conduct began while there was a close connection with the employment relationship.

229. Mr Owen argues that there is here not a sufficiently close relationship for the second stage of the test for vicarious liability to be satisfied.

230. He argues that the Defendant entrusted very limited tasks to PXM and only under close supervision. PXM's primary role was to shadow and learn from the teachers employed by the Defendant. PXM had no pastoral or caring role with respect to any pupil. The Defendant did not delegate any of its functions to PXM.

231. At most PXM would move between pupils playing club sport, coach and play with them. Mr Owen submits that PXM's position was completely different from that of the warden in *Lister*; and an even weaker case with respect to vicarious liability that the facts of *Jacobi*.

232. He argues that the content of the Defendant's policy documents is of no significance because compliance was expected of any person engaged within the Defendant's school, whether employee or independent contractor. Requiring PXM to sign the policies is not an indication that the risk was anticipated because of the "position" in which he was "placed" as is suggested on behalf of the Claimant.

233. Mr Owen submits that on the facts, there is no element of either tort committed by PXM while in a relationship with the Defendant. That distinguishes the present case from those in which wrongful activity has begun while the tortfeasor is "employed" and continues either outside the workplace, out of hours or after the relationship has ended.

234. The Defendant has not used PXM to further its interests; and has not done so in a manner that enhances the risk that the Claimant would suffer abuse from him. There is no causative link between the relationship between PXM and the Defendant and the wrongdoing. The most that can be said is that the Defendant provided an opportunity for PXM to meet the Claimant. That is not sufficient for vicarious liability to attach.

Analysis

235. Even if the first stage of vicarious liability had been established, my conclusion is that the second stage of the test for vicarious liability is not satisfied.

236. My starting point, even taking the broad view advocated by Mr Levinson, is my finding that the entirety of the wrongdoing occurred many weeks after PXM's relationship with the Defendant had ceased. That is a fundamentally different factual matrix from wrongful conduct that begins while the tortfeasor is in a relationship with a Defendant and continues outside or beyond the scope of that relationship - whether out of hours or after the relationship has ended. Neither Counsel could identify any

decision in which the second stage was found to be met in those circumstances. The wrongful conduct here was separated from any relationship that had subsisted in the past between the Defendant and PXM by both time and location.

237. Even assuming PXM was in a relationship with the Defendant that was akin to employment, the role he performed was extremely limited. PXM was kept under close supervision at all times. He had no private access to the Claimant at school, nor the opportunity for any.

238. He had no caring or pastoral responsibility in relation to the Claimant or any other pupil. He did not even have any teaching responsibility. No aspect of the Defendant's function was delegated to him.

239. Although the Defendant required its pupils to treat PXM with respect, he was not placed in a position of authority over the pupils. He was not used to carry on or further the interests of the Defendant in any real sense. Further, I am not satisfied that it has been proved that the Claimant was influenced even by a perception that PXM had authority or status within the Defendant's organisation. The Defendant simply allowed PXM to spend a week learning from its staff and while doing so, to provide them with some minor practical assistance under close supervision. That did not in my judgment significantly increase any risk created by the Defendant's enterprise of the Claimant later becoming a victim of abuse.

240. The fact that PXM was required to comply with the Defendant's safeguarding policies did not imply that any function had been delegated to PXM, nor was it in reality an acknowledgement of responsibility or role.

241. Using the features of *Jacobi* as a touchstone, there are many features of this case with some similarity though a substantially weaker basis for attaching vicarious liability than those identified in *Jacobi*:

a. The Defendant did not afford PXM any opportunity to have any private interaction with the Claimant; he was never in fact alone with her during the WEP;
b. The physical proximity and contact PXM had with the Claimant was only in connection with assisting her to play badminton in a public forum as part of a club with others; it had no private or intimate quality;
c. Facebook, which became the means by which PXM communicated with the Claimant and was, over time, used to manipulate her, was nothing whatever to do with the Defendant's school activities. The Defendant's policies forbade contact via social media between PXM and the Claimant. There was in fact no social media contact between them while the WEP subsisted. On the balance of probabilities, the communications shown to be wrongful did not commence until at least several weeks after the placement had ended;
d. The wrongful conduct was antithetical to the Defendant's safeguarding policies.

242. Unlike *Jacobi* all of the wrongdoing took place after the relationship between PXM and the Defendant had ceased. That is an important distinguishing feature that makes this an even weaker case for finding the second stage of vicarious liability to be established.

243. The most that can be said about the relationship between the Defendant and PXM was that it provided an opportunity for PXM to meet the Claimant. That is not sufficient for the second stage of the test.

Outcome

244. The Claimant was undoubtedly the victim of appalling and criminal acts of sexual assault. No part of this judgment should be construed as minimising that fact.

245. However I am not satisfied that the Defendant is vicariously liable for the torts committed against her.

246. The claim must be dismissed.

247. I invite Counsel to agree the form of Order consequent upon this judgment.